UMBC Insurans Bhd v TNB Risk Management Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–22–1446 OF 2003
HARMINDAR SINGH JC
25 FEBRUARY 2010

Contract — Agency — Transact insurance business — Policies sold — Premiums outstanding — No dispute raised on statement of accounts — Delay in raising objections — Whether an afterthought for defendant to quibble over accuracy of accounts — Whether equitable for defendant to deny debt owing

Contract — Insurance — Transact insurance business — Cancellation of policies or reduction in amount covered — Request for refund — Whether defendant has right under policy to claim refund — Whether refund of premiums made payable directly to policy owner — Insurance Act 1966 s 141(4)

The plaintiff, by an agreement, appointed the defendant as its agent to transact insurance business. The agreement provided that the defendant could sell policies, collect the premiums and remit the same to the plaintiff less the commissions. The defendant sold many general insurance policies on behalf of the plaintiff. The plaintiff was claiming a sum of RM145,333.61 being premiums outstanding for policies sold by the defendant. The premiums due were detailed in a statement of accounts dated 25 October 2000, where the statements were provided monthly showing the business transacted and the amounts due. The defendant however denied the said claim and had counterclaimed for a sum of RM792,485.28 which they claimed was the amount which ought to have been refunded owing to cancellation of policies or reduction in the amount cover. The counterclaim was in two parts, namely: (a) RM431,694.79 being premiums paid for policies which were subsequently cancelled without risk having being assumed; and (b) RM360,790.41 being premiums to be refunded owing to reduction in the value of the cover. The plaintiff resisted the counterclaim on two grounds. Firstly, the plaintiff claimed that it was the insured and not the defendant who was entitled to the refund of premiums, if any. Secondly, the plaintiff claimed that the defendant had failed to establish any entitlement to refund of the premiums paid. The issues considered by this court were on the entitlement of the parties as above.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim:

(1) DW1, the general manager of the defendant company, admitted that no

dispute was raised against the last statement of accounts dated 25 October 2000. He also agreed that there was no reply to the letter of demand dated 17 November 2000. Not having raised any objections for such a long period, it seems more like an afterthought for the defendant to now quibble over the accuracy of the accounts. It would also not be equitable for them to now deny their debt owing to the plaintiff (see para 11).

(2) There was no privity of contract between the plaintiff and the defendant with regard to the insurance contracts. The contract of insurance was between the plaintiff and the policy owner or the insured. The defendant was merely the plaintiff's agent who sold the policies on behalf of the plaintiff. It was clear by s 2 of the Insurance Act 1996 ('Act') that an 'insurance agent' is deemed to be acting as agent for the insurer only. In the circumstances, the defendant had no right under the policy to claim any refund (see para 18).

(3) The defendant was also not without fault as they together with the parent company, Tenaga Nasional Bhd, dealt with the plaintiff as if they were the one and same entity. Another striking feature, going by the correspondence in the bundle of documents, was that the defendant was treated by its parent company as if it was one of its departments rather than as a separate legal entity as should have been the case. In the circumstances, the court was constrained to hold that refunds could only be claimed by Tenaga Nasional Bhd, the policy owner, and not the defendant (see para 20).

(4) In the instant case, s 141(4) of the Act positively declares as a penal provision that any refund of premiums must be paid directly to the policy owner. This would mean that not only is the policy owner entitled to the premiums but that the premiums should be made directly to the policy owner. This provision would therefore prohibit the application of the estoppel doctrine in the way suggested by the defendant. In plain terms, the defendant could not hope to achieve by estoppel what was prohibited by a statutory provision (see para 23).

(5) In this regard, although there were requests for cancellation or reduction in cover, there was no evidence as to how much premiums were paid in respect of each policy. DW1 only adverted to lump sum figures but did not provide a breakdown for each policy. This could easily have been done if the policies in question were produced or details of them were provided. It was also incumbent upon the defendant to put to the plaintiff's witness the policies in question and the amount of refunds claimable. This was not done. There was no proof/insufficient proof that they were entitled to the sums claimed as stated in the counterclaim (see para 26).

[Bahasa Malaysia summary

Plaintif, menerusi suatu perjanjian, melantik defendan sebagai ejennya untuk menguruskan perniagaan insurans. Perjanjian tersebut memperuntukkan bahawa defendan boleh menjual polisi-polisi, mengambil bayaran premium dan memberikan kepada plaintif setelah ditolak komisyen. Defendan telah menjual banyak polisi insurans am bagi pihak plaintif. Plaintif menuntut sejumlah RM145,333.61 bagi premium terakru atas polisi-polisi yang telah dijual oleh defendan. Premium-premium yang terakru diperincikan dalam suatu penyataan akaun bertarikh 25 Oktober 2000, di mana penyataan tersebut dikeluarkan secara bulanan menunjukkan perniagaan yang dilakukan dan juga jumlah yang terakru. Defendan walau bagaimanapun menafikan tuntutan tersebut dan menuntut balas untuk jumlah RM792,485.28 yang mana mereka mendakwa merupakan jumlah yang harus dipulangkan disebabkan oleh pembatalan polisi atau pengurangan jumlah yang diinsuranskan. Tuntutan balas tersebut dalam dua bahagian, iaitu: (a) RM431,694.79 yang merupakan premium yang telah dibayar bagi polisi-polisi yang kemudiannya dibatalkan tanpa mengaggarkan risiko; dan (b) RM360,790.41 yang merupakan premium yang harus dipulangkan disebabkan oleh pengurangan nilai yang diinsuranskan. Plaintif menentang tuntutan balas tersebut atas dua alasan. Pertama, plaintif mendakwa bahawa ia adalah pihak yang diinsuranskan dan bukan defendan yang berhak kepada pemulangan premium tersebut, jika ada. Keduanya plaintif mendakwa bahawa defendan gagal membuktikan haknya untuk pemulangan premium yang telah dibayar. Isu-isu yang perlu dipertimbangkan oleh mahkamah ini adalah keberhakan pihak-pihak seperti yang disebut di atas.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan-defendan:

(1) DW1, pengurus am syarikat defendan mengakui bahawa tiada pertikaian atas penyataan akaun bertarikh 25 Oktober 2000. Dia juga bersetuju bahawa tiada jawapan bagi surat tuntutan bertarikh 17 November 2000. Setelah sekian lama tiada bantahan, sepertinya sesuatu yang difikirkan kemudian apabila defendan bersungut tentang ketepatan akaun tersebut. Juga tidak saksama bagi mereka untuk menafikan hutang mereka kepada plaintif kini (lihat perenggan 11).

(2) Tiada priviti kontrak antara plaintif dan defendan berkaitan kontrak-kontrak insurans. Kontrak insurans tersebut antara plaintif dan pemilik polisi atau yang diinsuranskan. Defendan hanyalah ejen plaintif yang menjual polisi-polisi bagi pihak plaintif. Adalah jelas berikutan s 2 Akta Insurans 1966 ('Akta') bahawa seorang 'ejen insurans' hanyalah dianggap sebagai ejen syarikat insurans tersebut. Dalam keadaan tersebut, defendan tiada hak di bawah polisi tersebut untuk menuntut sebarang pemulangan (lihat perenggan 18).

(3) Defendan juga bersalah kerana mereka, bersama dengan syarikat ibu, Tenaga Nasional Bhd, berurusan dengan plaintif seolah-olah mereka merupakan satu entiti yang sama. Satu lagi ciri yang ketara, melihat kepada surat-menyurat dalam ikatan dokumen-dokumen, adalah, defendan dianggap sebagai salah satu jabatannya oleh syarikat ibu sedangkan defendan merupakan entiti yang berasingan. Dalam keadaan ini, mahkamah terpaksa memutuskan bahawa pemulangan tersebut hanya boleh dituntut oleh Tenaga Nasional Bhd, pemilik polisi, dan bukannya defendan (lihat perenggan 20).

(4) Dalam kes ini, s 141(4) Akta secara positifnya mengisytiharkan sebagai peruntukan hukuman bahawa apa-apa pemulangan premium mestilah dibayar secara terus kepada pemilik polisi. Ini bermaksud bahawa bukan hanya pemilik polisi berhak ke atas premium tersebut tetapi juga premium tersebut harus dibayar terus kepada pemilik polisi. Maka peruntukan ini menghalang penggunaan doktrin estopel seperti yang dicadangkan oleh defendan. Dalam kata lain, defendan tidak boleh menggunapakai estopel untuk mencapai tujuannya apabila peruntukan statutori menghalangnya berbuat demikian (lihat perenggan 23).

(5) Dalam hal ini, walaupun terdapat permintaan untuk membatalkan atau mengurangkan jumlah insurans, tiada keterangan tentang berapa banyak premium yang telah dibayar bagi setiap polisi. DW1 hanya merujuk kepada jumlah besar tetapi tidak memberikan pecahan kepada setiap polisi. Perkara ini senang dilakukan jika polisi yang dipersoalkan dikemukakan atau butiran-butirannya diberikan. Adalah menjadi kewajipan defendan untuk memberikan kepada saksi plaintif polisi-polisi yang dipersoalkan dan jumlah pemulangan yang boleh dituntut. Tetapi ini tidak dilakukan. Tiada bukti/kekurangan bukti yang menunjukkan bahawa mereka berhak kepada jumlah yang dituntut dalam tuntutan balas (lihat perenggan 26).]

Notes

For cases on agency generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2443–2465.

For cases on contract of insurance generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 52–62.

Cases referred to

Public Textiles Berhad v Lembaga Letrik Negara [1976] 2 MLJ 58, FC (refd)

Legislation referred to

Insurance Act 1996 ss 2, 141, 141(4)

P Mithran (SS Dass with him) (Dass, Jainab & Associates) for the plaintiff.

Abu Bakar Jais (Mohamed Noor Mahmood with him) (Mohamed Noor Mahmood, Amran & Yoon) for the defendant.

Harmindar Singh JC:

[1] The plaintiff was a licensed insurer and engaged in general insurance business. The plaintiff was later known as Mayban General Assurance Bhd. By a vesting order of the High Court dated 28 May 2009, the entire business of the plaintiff came to be vested in Etiqa Insurance Bhd. The defendant was a wholly owned subsidiary company of Tenaga Nasional Bhd.

[2] By an agreement dated 11 February 1998, the plaintiff appointed the defendant as its agent to transact insurance business on the terms and conditions appearing in the said agreement. The defendant then sold many general insurance policies on behalf of the plaintiff. The agreement provided that the defendant could sell policies, collect the premiums and remit the same to the plaintiff less the commissions. The plaintiff is now claiming a sum of RM145,333.61 due as at 25 October 2000 being premiums outstanding for policies sold by the defendant. The defendant is denying this claim and has also counterclaimed for a sum of RM792,485.28 which they claim is the amount which ought to have been refunded owing to cancellation of policies or reduction in the amount cover.

[3] The broad issues are therefore, firstly, whether the defendant is indebted to the plaintiff in the sum of RM145,333.61 being unremitted premiums and secondly, whether the plaintiff is indebted to the defendant in the sum of RM792,485.28 being what the defendant claims to be monies that ought to be refunded when the policies were cancelled or when the amount of cover was reduced.

THE EVIDENCE

[4] The evidence adduced at the trial revealed the following. By the agreement of 11 February 1998 ('the agreement'), the defendant as agent would sell policies and collect the full premium from the insured party. The insured party was in all cases Tenaga Nasional Bhd, its contractors and all nominated subcontractors for the projects that were carried out by Tenaga Nasional Bhd. The defendant would then remit the premiums to the plaintiff after deducting the commission due to the defendant.

[5] Now the defendant did make payments for the premiums collected but as the plaintiff claimed, a sum of RM145,333.61 as at 25 October 2000 had

yet to be settled. The premiums due were detailed in a statement of accounts, which statements were provided monthly and which showed the business transacted and the amounts due.

[6] The statement of accounts which forms the basis of the plaintiff's claim is dated 25 October 2000 (pp 37–45, Bundle B). The amount due as shown in the accounts is supported by the debit notes. The evidence disclosed that for all the policies sold by the defendant, a debit note will be processed and posted on the computer system automatically to reflect the amount due in the statement of accounts. Now it should also be noted that there were also refunds made due to cancellation of policies or where the cover was reduced. If that was the case then credit notes were posted and these were also reflected automatically in the statement of accounts.

[7] Significantly as well, by virtue of cl 3.3 of the agreement, the defendant was obliged to remit all premiums to the plaintiff within 60 days from the issuance of the policies. By cl 3.4 of the agreement, the defendant was liable for the premiums even if the same was not collected from the insured.

THE PLAINTIFF'S CLAIM

[8] Since cl 3.4 of the agreement made the defendant liable for all premiums even if they were not collected from the insured, the statement of accounts becomes crucial as it will reflect the amount of premiums that are due. The defendant, however, has assailed the statement of accounts on the ground that it does not show proof of the amounts due. Is the defendant right? After careful consideration, I do not think so and my reasons are as follows.

[9] Firstly, the statement of accounts was processed and derived through the posting of the debit notes into the computer system. The debit notes themselves are computer generated. The debit notes are therefore directly and automatically linked to the statement of accounts and would therefore show the amounts due. It should be noted that the statement of accounts also take into account, in the same way, credit notes for which the amount due will be reduced accordingly. Set out in this way, and with the production of the debit notes, there ought to be little doubt as to the accuracy of the statement of accounts in reflecting the status of policies sold and premiums due.

[10] Secondly, and in any event, my assessment of the dealings between the parties is that by their conduct, both parties had agreed that the statement of accounts would be the way in which the status of the premiums due would be assessed between them. I say agreed also for the reason that there was no objection to this. It is also significant that these statements of accounts were

sent monthly with the last statement being dated 25 October 2000. In the statement of accounts itself, the defendant is alerted to the fact that they can dispute the entries but with the caveat that they must do so within 14 days. The defendant was therefore deemed to have agreed that it was their duty to dispute the entries if they thought there was any error.

[11] Now it was admitted by DW1, who was the general manager of the defendant company, that no dispute was raised against the last statement of accounts dated 25 October 2000. He also agreed that there was also no reply to the letter of demand dated 17 November 2000. Not having raised any objections for such a long period, it seems more like an afterthought for the defendant to now quibble over the accuracy of the accounts. It would also not be equitable for them to now deny their debt owing to the plaintiff.

[12] In the circumstances, I would hold that the plaintiff has proved on a balance that the sum claimed was indeed a debt due by the defendant to the plaintiff.

THE COUNTERCLAIM

[13] The counterclaim is in two parts, namely:

(a) RM431,694.79 being premiums paid for policies which were subsequently cancelled without risk having being assumed, and

(b) RM360,790.41 being premiums to be refunded owing to reduction in the value of the cover.

[14] The plaintiff is resisting this counterclaim on two grounds. Firstly, the plaintiff is claiming that it is the insured and not the defendant who is entitled to the refund of premiums, if any. Secondly, the plaintiff claims that the defendant has failed to establish any entitlement to refunds of the premiums paid.

Who is entitled to the refund of the premiums?

[15] Under s 141 of the Insurance Act 1996 ('the Act'), an insurance company can only pay any refund of premiums directly to a policy owner. A failure to do so will attract a penalty fine of up to RM500,000. In s 2 of the Act, a 'policy owner' is defined as the person who has legal title to a policy.

[16] Probably with these provisions of the Act in mind, the defendant sought to show that they were also a policy owner in that they were also a nominated subcontractor of Tenaga Nasional Bhd. However, apart from DW1's oral testimony, there is no other evidence supporting this claim.

[17] In this regard as well, it was admitted by DW1 that the main business activities of the defendant were arranging insurance coverage for project and operation risks as well as providing risk management related consultancy services to Tenaga Nasional Group. The defendant themselves were not involved in any of the projects. I therefore considered it implausible that they would be the nominated subcontractors as claimed. That was probably why they were unable to produce a single document to show that they were nominated subcontractors as they claimed. The defendant's claim that they were also the policy owners was clearly unsustainable.

[18] What is also significant about the whole arrangement is that there was no privity of contract between the plaintiff and the defendant with regard to the insurance contracts. The contract of insurance was between the plaintiff and the policy owner or the insured. The defendant was merely the plaintiff's agent who sold the policies on behalf of the plaintiff. It was clear by s 2 of the Act that an 'insurance agent' is deemed to be acting as agent for the insurer only. In the circumstances, the defendant had no right under the policy to claim any refund.

[19] I think much of the confusion arose because of the way in which the plaintiff and the defendant dealt with one another. With the statement of accounts reflecting both the debit notes and the credit notes, it would appear that the plaintiff had treated both the policy owner (Tenaga Nasional Bhd) and the agent (defendant) as the same entity. However, what stands out is the fact that although credit notes were reflected in the statement of accounts, actual payment through cheques was made directly to the policy owner Tenaga Nasional Bhd in keeping with the mandatory provisions of the Act.

[20] The defendant is also not without fault as they together with the parent company Tenaga Nasional Bhd dealt with the plaintiff as if they were the one and same entity. Another striking feature, going by the correspondence in the bundle of documents, is that the defendant was treated by its parent company, Tenaga Nasional Bhd, as if it was one of its departments rather than as a separate legal entity as should have been the case. In the circumstances, I was constrained to hold that refunds can only be claimed by Tenaga Nasional Bhd, the policy owner, and not the defendant.

[21] The defendant, however, had one last argument. They reasoned that the doctrine of estoppel applies because of the way in which the parties had conducted business and dealt with one another. Since it was the practice of the parties that refunds were to be reflected in the statement of accounts through the issuance of credit notes, the plaintiff was now estopped from denying the debt due to the defendant.

[22] At first sight, this line of argument seems compelling. However, there appears to be a simple answer to the defendant's disputation. The answer is that it is settled law that the doctrine of estoppel would not apply if in doing so it would go against or nullify any statutory provision. In the Federal Court case of *Public Textiles Berhad v Lembaga Letrik Negara* [1976] 2 MLJ 58, Raja Azlan Shah (as His Highness then was) observed: 'In other words, in cases where the doctrine of estoppel has been excluded it is because to have decided otherwise would have allowed a person to achieve by an estoppel against himself something which he could not otherwise lawfully do.'

[23] In the instant case, s 141(4) of the Act positively declares as a penal provision that any refund of premiums must be paid directly to the policy owner. This would mean that not only is the policy owner entitled to the premiums but that the premiums should be made directly to the policy owner. This provision would therefore prohibit the application of the estoppel doctrine in the way suggested by the defendant. In plain terms, the defendant cannot hope to achieve by estoppel what was prohibited by a statutory provision.

[24] For the reasons aforesaid, the counterclaim was untenable and must fail.

Has the defendant established entitlement to the refund of the premiums?

[25] For the sake of completeness, I will also deal with this issue. In this regard, I agree that to establish the entitlement to the refund of the premiums, the defendant must prove that firstly the policies were issued and paid in full and secondly that there was a request of cancellation or reduction and that it was in accordance with the respective policies of insurance.

[26] In this regard, although there were requests for cancellation or reduction in cover, there was no evidence as to how much premiums were paid in respect of each policy. DW1 only adverted to lump sum figures but did not provide a breakdown for each policy. This could easily have been done if the policies in question were produced or details of them were provided. It was also incumbent upon the defendant to put to the plaintiff's witness the policies in question and the amount of refunds claimable. This was not done. For all these reasons, I find that the figures that the defendant has put up remain just that — mere figures. There is no proof or insufficient proof that they are entitled to the sums claimed as stated in the counterclaim. For this reason as well, the defendant must fail in their claim.

THE RESULT

[27] In the upshot, the plaintiff's claim for the sum of RM145,333.61 is

allowed with interest at 8%pa from the date of the writ of summons until realisation. The counterclaim is dismissed. The plaintiff is also entitled to costs for both the claim and the counterclaim. After hearing the parties, I assess the costs in the sum of RM40,000.

Plaintiff's claim allowed and defendant's counterclaim dismissed.

Reported by Ashgar Ali Ali Mohamed